original investment in poles.

While a utility should recover a return on its actual investment, SBC acknowledges that cost of removal is gradually funded by the utility's ratepayers over the life of the pole. Since the carrier should be compensated for only the unrecovered investment to which the rate of return is applied, SBC agrees it is appropriate to compute the return element based on the unadjusted net pole cost balance, even after the net pole cost becomes negative.

Similarly, SBC agrees with the NPRM's proposal that operating taxes should be computed based on the unadjusted net pole cost balance.

IV. FOR ACCUMULATED DEFERRED INCOME TAX, THE COMMISSION SHOULD USE ACTUAL POLE FIGURES INSTEAD OF A PRORATE OF THE TOTAL PLANT FIGURE.

The NPRM seeks comments on other proposed adjustments to the formula. One change that is not described in the text of the NPRM is shown in Appendix "B" and Appendix "C". According to Appendix C, accumulated deferred income tax ("ADT") for conduit is computed by prorating the ADT figure for total plant-in-service to poles. The formula for conduit ADT is shown as "E/K * M", where "E" is gross conduit investment, "K" is total gross plant investment and "M" is total plant ADT. It is not clear whether Appendix "B" intends for the same method to be used for poles, but SBC assumes that a consistent method is implied in Appendix "B". Use of a proration for this component is a change

compared to the formulas adopted by the Commission in 1987.

In the Report and Order in CC Docket No. 86-212, the Commission specified that "Accumulated Deferred Income Taxes (Poles)" was to be used in calculating the net cost of the bare pole.[30] In that Report and Order, the Commission did not require use of a proration method to determine the pole-specific ADT.

Actual ADT figures for poles and conduit are available from the carrier's books and records, just as other variables in the formula are also available (e.g., "Depreciation Reserve Poles"). Therefore, it is unnecessary and inaccurate to use a proration method to estimate the amount of ADT for poles and conduit. A significant difference results if one uses a prorate instead of the actual figures.[31]

Under the NPRM's proration method, the ratio of pole to total plant gross book investment is used to allocate total plant ADT. This assumes that there is a correlation between the levels of gross investment and ADT in the case of poles. This is simply not the case. ADT is calculated based on the difference between book depreciation and tax depreciation. That is, ADT is a function of the tax rate applied to the difference between

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[30] Report and Order, 2 FCC Rcd at 4403 Attachment.

[31] In the alternative, if a proration method is used for ADT, then SBC contends that it would be equally appropriate to use a proration method to determine the Depreciation Reserve attributable to poles. While SBC does not believe a proration should be used in either case, if such a method is used for ADT, it would be no less justifiable to use it for the Depreciation Reserve.

depreciation calculated on a straight-line basis for book purposes (and including future net salvage) compared to the accelerated depreciation used for tax purposes. As reflected in the quite large depreciation reserve for poles, the book depreciation results for the pole account and for the remainder of the plant-in-service are radically different in nature. Thus, the amount of ADT for a given amount of pole plant will not resemble at all the amount of ADT associated with the same amount of other plant-in-service. As a consequence, allocating ADT for all plant-in-service to the pole account yields a completely inaccurate result.

For example, SWBT's ADT for poles is a very large negative figure, while a proration of total ADT to poles using the method in the NPRM yields a large negative figure. To illustrate this point: in Oklahoma in 1992, the pole-specific ADT was approximately negative $2 million while a proration of total plant ADT to poles yielded approximately positive $2.7 million - a difference of $4.7 million. The negative $2 million of ADT for poles is a function of the fact that Part 32 book depreciation for poles is much higher than pole depreciation calculated for purposes of the tax return.

As the foregoing demonstrates, to avoid an irrational results, the most accurate pole-specific ADT figure needs to be

used, instead of a grossly inaccurate proration.[32]

V. THE COMMISSION SHOULD ADOPT THE PROPOSED TRANSLATION OF THE FORMULA FROM PART 31 TO PART 32 ACCOUNTS.

The Commission last reviewed the pole attachment formula in 1987, the year before Part 32 went into effect. As a result the formula is stated in terms of Part 31 accounts. The NPRM proposes to restate the formula in terms of Part 32 accounts.[33] SBC agrees with the proposed changes. For example, SBC agrees that the NPRM accurately identifies the accounts containing non-project specific administrative expenses that should be used in calculating the administrative carrying charge. With these changes, disputes over the proper Part 32 amounts to include in each component of the formula should be minimized.

VI. THE RATE OF RETURN SHOULD BE PRESUMED TO BE 11.25%

The NPRM proposes to uniformly use 11.25% as the rate of return "in all states which no longer specify a rate of return." For the sake of simplicity, SBC recommends that utilities should have the option of using 11.25% as the rate of return in all states, regardless of the existence of an intrastate rate of return. Uniform use of 11.25% in all states would be consistent

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[32] If the Commission adopts a gross book method, then this problem is avoided in part because those expense elements that are calculated using gross book costs would not be affected by inaccurate ADT figures. However, under the gross book method recommended by SBC, net book cost would continue to be used to compute the tax and return expenses. Therefore, even under a gross book method, it is important to use an accurate figure for ADT.

[33] NPRM, ¶30.

with the uniform use of that rate of return under the Commission's affiliate transaction rules.[34] It would also avoid disputes over the applicability of a particular intrastate rate of return.

VII. AN IDEAL FORMULA WOULD PROVIDE COMPENSATION FOR CURRENT OR REPLACEMENT COSTS.

In these Comments, SBC urges the Commission to adopt a formula for calculating maximum pole attachment rates that primarily uses gross book costs, as described in paragraph 29 of the NPRM. An ideal method would also consider current or replacement costs as a factor. A formula that is based on historical costs alone grossly understates the costs that a utility is incurring in current periods to replace exhausted facilities. This shortfall in recovery is particularly acute for conduit expansions required in the most congested locations -- conduits in central business districts and metropolitan growth corridors. Under the guidelines provided by the Commission in the Local Competition Proceeding, CC Docket No. 96-98, a utility is required to allow its competitors to use any and all spare capacity.[35] The utility is not allowed to reserve any capacity for its own future use in providing telephone service to its own customers. As a result, once attachers exhaust all of the spare

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[34] Accounting Safeguards Order, CC Docket No. 96-150, 11 FCC Rcd 17539 ¶ 166 (1996).

[35] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 11 FCC Rcd 1544 ¶¶ 1170 (1996).

capacity, if the utility needs additional space, it will be required to incur the up-front, current costs to build additional capacity. If the utility had been allowed to reserve capacity for its forecasted utility purposes, the utility would not have incurred the cost of building additional capacity. Hence, a method that is based on historical costs alone does not fully compensate the utility for the depletion of capacity and property taken as a result of the application of Section 224.[36]

In view of the additional costs that the Commission's policies will require utilities to incur, the Commission's formula ideally should provide utilities a recovery based on the current or replacement cost of some poles and conduit. SBC recognizes, however, the complexity of augmenting the formula to include compensation for current or replacement costs the utility would not incur otherwise[37] and thus, supports the use of the gross book method based on historical costs as the most practical approach at this time.

VIII. A HALF-DUCT CONVENTION SHOULD BE USED FOR CONDUIT.

Until the last couple of years, the Commission had no

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[36] For a discussion of the "taking" issue, see Section XII below.

[37] In some states, such as California, current or replacement costs may have been determined already in state proceedings. In such jurisdictions, it would not be as difficult to design a formula that recovers current or replacement costs, and a state may choose to do so by "reverse preemption" pursuant to Section 224(c).

experience in applying the Pole Attachment Act to cable operators' use of conduit space.[38] This was not surprising because cable operators have seldom used conduit in the past.[39] However, under the 1996 Act, telecommunications carriers have the right to have access to conduit space and cable operators may find conduit space more useful. For these and other reasons, use of conduit space is likely to become more widespread. Therefore, it is important that the Commission establish a simple method of determining rates for conduit use by carriers and cable operators, as proposed in the NPRM.[40] A half-duct convention is a simple method of estimating the amount of space occupied by a conduit attachment.

An exact measurement of the percentage of the total conduit capacity occupied by an attachment would be an impractical and costly method. Such an exact method would require a determination of the total cubic footage of the conduit system or the square inches of an average cross-section of conduit. Then, the volume or area occupied by an attacher would have to be measured in cubic feet or square inches as well. This would require extremely

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[38] SBC is only aware of two Section 224 complaint proceedings involving conduit: (1) Multimedia Cablevision, infra and (2) Time Warner Cable v. GTE Hawaiian Tel. Co. Inc., P.A. No. 95-005.

[39] This was also the reason that the Commission's rules focused on pole attachments. See Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC Docket No. 78-144, 72 F.C.C. 2d 59, 62 n.4 (1979).

[40] NPRM, ¶¶43-46.

complex engineering studies that would likely cost more than the total current revenue from a utility's conduit licensing.

While SBC previously has maintained that an even simpler "linear" method should be allowed,[41] SBC has since concluded that such a method is not workable in an increasingly multi-user environment in which it is less likely that an entire duct can be dedicated to an individual user.

In the Greater Media decision, in resolving a complaint against New England Telephone, the Massachusetts Department of Public Utilities ("MDPU") concluded that a half-duct convention was an appropriate method. Further, in a recent complaint proceeding, Multimedia Cablevision, Inc. v. SWBT,[42] the Commission concluded that this was the simplest method to apply while remaining consistent with the Pole Attachment Act. It is also reasonably precise if properly applied.

Under this method, as applied in Multimedia Cablevision, the total capacity of the conduit system is based on the number of ducts in the average conduit run. This number can be determined from a carrier's property records which state the total trench kilometers and the total duct kilometers in a carrier's conduit system. For example, in Multimedia Cablevision, SWBT's Kansas conduit system contained 1,165 trench kilometers and 9,001 duct

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[41] Multimedia Cablevision, Inc. v. SWBT, 11 FCC Rcd. 11202, ¶18 (1996).

[42] CS Docket No. 96-181, 11 FCC Rcd 11202 (1996) ("Multimedia Cablevision").

kilometers, which yielded an average of 7.73 ducts per trench. The next step in the application of the half-duct method is to subtract any ducts that are reserved, and thus, not available for licensing to attachers. Generally, at least one duct is reserved for maintenance or emergency purposes. Also, many municipalities require that conduit space be set aside for municipal use, such as private communications systems used for local government purposes.

After subtracting the reserved ducts, it is necessary to determine the portion of this total space occupied by the attacher's cables. The MDPU's half-duct convention is based on the assumption that the average attachment will occupy half of an average size duct. In other words, the space occupied by a typical cable operator attachment does not "preclude the use of the other half of the duct." In applying the half-duct convention in Multimedia Cablevision, the Commission noted the following:

> We recognize that this presumption does not make any distinction as to the size of the cable or whether the cable operator utilizes coaxial or fiber optic cable. Currently, we are unaware of any cable operators who use cable in excess of 1.5 inches in diameter. Thus, it is not technically feasible that a cable operator would occupy the entire duct with a single attachment.[43]

Likewise, this half-duct convention does not make any distinction as to the size or condition of the duct in which the cable is

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[43] Multimedia Cablevision, 11 FCC Rcd at 11211 n.51.

installed. Instead, this method assumes an average size cable in an average size duct.

Of course, the half-duct convention must be applied in a manner that recognizes real-world conditions of conduit. For example, a bare cable in a duct renders that duct unusable by others as a practical matter. However, if the duct is subdivided by the use of inner duct and that same cable is placed in inner duct, then the remainder of the duct is not rendered unusable. A bare cable in a duct fully occupies the duct because pulling any additional cable over the original cable places the original cable at risk.

One of the most important real-world conditions to consider is the widespread use of fiber optic cables and inner duct. To make efficient use of duct space and to protect facilities, it has become commonplace for utilities to require that new non-copper facilities be placed in inner duct. Each inner duct is dedicated to an individual user. Although the MDPU did not expressly address how a half-duct convention is to be applied to inner duct, a cable placed in an inner duct does not render the remainder of the duct unusable. Thus, a reasonable and practical method of applying the half-duct convention in the context of inner duct is to presume that each inner duct occupies a half-duct of space.

The presumption used by the MDPU was that the average attachment to a duct would not preclude the use of the other half

of the duct. This presumption should not require an exact measurement to determine whether a facility occupies more or less than 50% of a duct. Instead, utilities should be able to use reasonable procedures for determining when a cable precludes use of the other half of the duct. For example, when inner duct is used, this presumption should mean that there are two inner ducts on the average in each duct and the rate applicable to each inner duct is the half-duct rate. This is analogous to the presumption in the case of poles that the average pole has 13.5 feet of usable space. The fact that a particular pole may have more or less than 13.5 feet of usable space does not change the rate applicable to each attachment to that pole. Likewise, some conduit may have smaller two-inch duct and other conduit may have larger four-inch duct, but the presumption is that the average duct will accommodate two inner ducts. This is a reasonable presumption based on real-world conditions.

A key factor in the placement of fiber is the ability to pull cable or inner duct into the duct. Use of inner duct in a duct significantly increases the pull-in length. An increased pull-in length provides benefits such as reduction of the cost of splicing because splices need not be placed as close together. For a number of reasons, a large portion of conduit cannot accommodate more than two inner ducts. For example, in the case of SWBT, less than 20% of its duct capacity uses four-inch duct. The vast majority of the ductwork uses three or three and one-

half inch duct made of various material such as concrete, fiber, tile, cast iron or creosote wood. Such conduit is composed of relatively short sections that are joined by connectors and made of materials that have a much higher coefficient of friction compared to PVC pipe. These and other circumstances, such as the settling of sections into the soil, reduce the capacity of many ducts. For these reasons, it is reasonable to assume that the average duct can accommodate two inner ducts.

For those utilities that do not generally use inner duct, the MDPU's half-duct convention can be used without the necessity of clarifying how it should be applied to inner duct. However, given that it is standard practice to use inner duct in telecommunications conduit construction, the Commission should adopt this guideline for applying the half-duct convention to inner duct.

IX. ADJUSTMENTS TO USABLE CONDUIT SPACE SHOULD BE ALLOWED FOR MAINTENANCE AND MUNICIPAL REQUIREMENTS AND TO RECOGNIZE PHYSICALLY DAMAGED DUCTS.

SBC concurs with the NPRM's proposal to adjust the average number of ducts for the number of reserved maintenance ducts.[44] It is common practice not to use the last remaining duct along a particular conduit route between two manholes. It is prudent to set aside at least one full duct for maintenance, repair and emergency restoration activities. For example, if a cable were damaged, then a new cable can be placed in the spare maintenance

[44] NPRM, ¶45.

duct before the damaged cable is removed. In this manner, service is not disrupted or delayed while the damaged cable is removed. Another example of the potential benefit of a spare maintenance duct is that it can be used during consolidation of other cables in the duct. For example, if an attacher wants to replace two smaller cables that are in two separate ducts with a single larger cable, the larger cable can be installed prior to removing the two smaller cables.

The spare maintenance duct(s) also benefits attachers and potential attachers because it can be used to create additional spare capacity by making more efficient use of congested conduit space. The existence of the maintenance duct allows the utility to consolidate facilities in a congested conduit to free up space for itself and attachers.

Because the spare maintenance duct(s) provides benefits to all occupants of the conduit, the Commission should include an adjustment for reserved maintenance ducts in the conduit formula. Because at least one spare maintenance duct is customarily reserved by prudent utilities, the Commission should adopt a rebuttable presumption that one duct is reserved for maintenance. If a utility can show that additional ducts are customarily reserved for maintenance, that utility should be allowed to deduct the actual number of ducts it reserves for maintenance.

With the entrance of a number of other CLECs into the local exchange business, demand for conduit may increase significantly.

One consequence of an increase in demand will be an increased demand for the spare maintenance duct in connection with CLECs' build-outs. These circumstances may require that more than one duct be set aside for maintenance purposes. The conduit formula should take these circumstances into account in order to encourage utilities to reserve adequate maintenance capacity for utility, CLEC and other attacher construction and maintenance activity.

An adjustment should also be allowed for any ducts which are reserved or used for municipal or other governmental purposes such as fire or police protection. Often, the franchising authority will impose a requirement to set aside conduit space in granting the right to use the public right-of-way. Such municipal requirements reduce the amount of conduit space available to the utility and attachers. Consequently, it should not be included in the usable conduit space. Because this type of municipal use is not a universal requirement, this deduction should only be allowed in those jurisdictions where such municipal requirements are prevalent.

The MDPU's Greater Media decision in which the half-duct convention was first applied recognized both of these adjustments to the usable space. Similar adjustments should be allowed under the Commission's conduit rules.

The condition of older conduit warrants an additional adjustment to reflect that many ducts are not in a usable

condition. In other words, the fact that a duct is on the utility's records does not mean that it is usable. Given that the retirement unit is typically the entire conduit, it is not possible to retire individual ducts that are blocked or otherwise unusable. Further, it is not possible in many cases to repair a damaged duct without digging up and/or replacing the conduit at a considerable expense and disruption of the healthy ducts. Consequently, an additional adjustment should be made to take into consideration that not all ducts on the utility's property records are in usable condition.

X. EXCEPT FOR REASSIGNMENT OF SAFETY SPACE AS NON-USABLE, THERE IS NOT A SUFFICIENT BASIS TO CHANGE THE OTHER POLE HEIGHT AND USABLE SPACE PRESUMPTIONS FOR TELEPHONE UTILITIES.

In response to a Whitepaper filed by a group of electric utilities (the "Electric Utilities"), the NPRM asks "whether [the] current pole height and usable space presumptions are still applicable or whether these presumptions should be modified."[45] While SBC cannot address this question from the same perspective as the Electric Utilities, generally there have not been any significant developments that would require a change in the Commission's existing pole height and usable space presumptions as they apply to telephone operating companies. However, one exception, discussed below, is the allocation of the 40-inch safety space between electric and communications lines.

The Electric Utilities contend that average pole height of

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[45] NPRM, ¶18.

37.5 feet is no longer accurate and that it should be increased to 40 feet. The primary basis for their contention is that 35-foot poles have been replaced with 40-foot and taller poles as a result of growing demand for access by cable operators and other third parties.[46] Even if 35-foot poles are being replaced, this alone does not show that the average pole height exceeds 37.5 feet. The Electric Utilities have not presented any specific information to substantiate an increased average pole height.[47]

The Commission's original presumption that the average pole is 37.5 feet was not established by a study or statistical survey of pole heights nationwide. Rather, this presumption was based merely on the Commission's observation that "the most commonly used poles are 35 and 40 feet high."[48] Therefore, the Commission adopted the arithmetic average of these two figures. However, in reality, 37.5 feet did not represent the precise figure for the average pole. It may be that the number of 35-foot poles

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[46] NPRM, ¶18; Electric Utilities Whitepaper at 10. Another reason that taller poles are required in many instances is the increased space needed for electric transmission purposes.

[47] The Electric Utilities also claim that 30-foot poles should be eliminated from the computation of net pole cost because such poles allegedly will not accommodate third party attachments. While they do not claim that the exclusion of such poles should cause an increase in the average height of poles, the two points seem to be related. Because SBC does not agree that 30-foot poles should be excluded from the computation of telephone net pole cost, SBC maintains that there should be no impact on the average height of the poles of a telephone utility.

[48] 1979 Pole Attachment Order, 72 F.C.C. 2d at 69 ¶21.

exceeded the number of 40-foot poles. Assuming that the number of 40-foot and taller poles has increased, it may be that this has simply increased the true average so that it is now closer to 37.5 feet. For these reasons, SBC submits that telephone utilities should be allowed to continue using the 37.5-foot average pole height presumption. The Commission could consider changing this presumption if presented with an industry-wide statistical study that meets the requirements of Section 1.363 of the Commission's rules.[49]

While the Electric Utilities claim that the average pole height should increase from 37.5 to 40 feet, they suggest that the usable space should be reduced from 13.5 to 11 feet. Although, as explained above, SBC does not support the increase in the average pole height (at least not for telephone utilities), SBC does agree that the usable space presumption should be re-examined in light of the considerations raised by the Electric Utilities.

The main change in the usable space suggested by the Electric Utilities is the exclusion of the 40-inches of safety clearance generally[50] required between electric and

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[49] 47 C.F.R. § 1.363.

[50] In some jurisdictions, local codes require a larger safety space. For example, in California, safety clearances are governed by General Order No. 95 of the California Public Utilities Commission, which in most cases requires a 72-inch clearance between communication and electrical supply conductors. (G.O. 95, Rule 87.4-C4.)

communications space. The Commission reviewed the allocation of the 40-inch safety space when it originally adopted the usable space presumption. The Commission decided that the 40-inch clearance should be considered usable space, but that no portion of it should be assigned to a cable operator attachment. This determination rested on three factors. First, the legislative history of the Pole Attachment Act indicated that Congress believed that a cable operator occupies one foot of space. Second, cable operators were generally required to be responsible for pole replacement costs when the addition of telephone or electric lines would have reduced the safety space to less than 40 inches. Finally, the Commission noted that electric utilities often make "resourceful" use of this safety space for their own ancillary attachments.

As a result of the 1996 Act, the second factor has changed and it no longer supports the original allocation of the 40-inch safety space. Further, in light of the dramatic changes brought about by the 1996 Act such as the elimination of barriers between the telephone, cable and electric industries, the justification provided by the previous legislative history has been weakened substantially. As for the third factor, SBC questions whether electric utility use of the safety space should be considered at all in the case of telephone utilities' poles. From the telephone utility's perspective and anyone else other than the electric utility, the safety space is not usable. While it is unusable,

the enhancement of safety that it provides does benefit all attachers.

Since enactment of the 1996 Act, a utility is no longer allowed to require a cable operator to pay for pole replacement or other costs "required as a result of an additional attachment or the modification of an existing attachment sought by any . . . entity (including the owner . . .)"[51] other than such cable operator. Therefore, the previous decision to avoid allocating any of the costs of the safety space to the cable operator attachment can no longer be justified by the previous allocation of responsibility for replacement or rearrangement costs. Under the existing formula that allocates the nonusable space based on the same factor as the attacher's share of the usable space, the reassignment of the safety space to the nonusable category only requires each attacher to bear a fraction of the cost of the safety space based on its share of the remaining usable space.

The Commission should reconsider the allocation of safety space based on the changes that have dissolved or substantially weakened the original grounds for this decision. As a result, the safety space should be considered nonusable and the usable space presumption should be revised accordingly.[52]

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[51] 47 U.S.C. §224(i). See also 47 C.F.R. §1.1416.

[52] SBC mainly has addressed those portions of the Whitepaper that were described in the NPRM. SBC does not necessarily agree with other portions of the Whitepaper. SBC may address other issues presented in the Whitepaper in its Reply Comments. For example, SBC does not agree with the Whitepaper assumption that

XI. POLES OF 30 FEET IN HEIGHT OR LESS SHOULD NOT BE ELIMINATED FROM TELEPHONE UTILITY INVESTMENT AND POLE COUNTS.

The NPRM seeks comments on the Electric Utilities' suggested elimination of 30-foot and shorter poles from the investment and pole count.[53] The Electric Utilities reason that such poles do not have sufficient usable space to accommodate multiple attachments. While SBC cannot address authoritatively the actual circumstances of electric utilities, the Electric Utilities' reasoning does not apply to telephone utilities such as SWBT and PacBell. SWBT and PacBell have many poles that are not joint use. A significant share of SWBT's poles are not joint use. These poles can accommodate a number of attachments because they are not restricted by the electric space requirements. For example, a 25-foot pole with 18 feet of ground clearance and 5 feet underground would have about 2 feet of space available above the lowest attachment.[54]

Besides, SBC's telephone operating companies do not maintain pole investment records based on the height of poles. Investment

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telephone utility attachments occupy 2.5 feet of space on the average pole. If this assumption were considered by the Commission, the Commission would also need to reconsider the assumption that an attacher only occupies one foot of space, especially in the case of CLECs who may use attachments comparable to those used by incumbent LECs.

[53] NPRM, ¶20.

[54] In addition, spot poles that are placed away from the main line of poles are ordinarily shorter than 30 feet and can accommodate multiple attachments because they are not subject to the same ground clearance.

is tracked based on vintage, not height. Therefore, some type of study or assumptions would be required to estimate the investment associated with the shorter poles. This adjustment to the investment would complicate unduly the calculation of the gross or net cost of a bare pole. Further, it is not clear that any advantage in making this adjustment would justify the complexity created by these additional steps because the investment as well as the pole count would be reduced.

For these reasons, SBC opposes elimination of shorter poles from the investment used by telephone utilities to calculate pole attachment rates.

XII. THE COMMISSION SHOULD ASSURE THAT POLE ATTACHMENT RATES PROVIDE FAIR MARKET VALUE "JUST COMPENSATION" TO UTILITIES.

In view of the change in the Pole Attachment Act making physical access to space on utilities' poles mandatory, the formula adopted in this proceeding must assure that utilities receive "just compensation" as required by the Constitution. The applicable standard of just compensation is fair market value.[55] When GTE raised this issue in the context of the Local Competition Proceeding, CC Docket No. 96-98, the Commission stated it would be appropriate to consider that issue in a separate rulemaking proceeding to examine pole attachment rates.[56] SBC urges the Commission to consider this issue to

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[55] United States v. Miller, 317 U.S. 369, 373-74 (1943).

[56] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 11 FCC Rcd

assure that the rate methodology adopted in this rulemaking is consistent with the requirement to provide just compensation to pole owners in connection with the taking of utilities' pole and conduit space under Section 224.

XIII. THE COMMISSION NEEDS TO ADDRESS THE METHOD OF ALLOCATING POLE AND CONDUIT MODIFICATION COSTS.

In the Local Competition Proceeding, CC Docket No. 96-98, the Commission provided general guidelines concerning the allocation of the costs of modifications to poles or conduits incurred for the benefit of specific parties.[57] With respect to one of these guidelines provided, for example, the Commission stated that "[t]o protect the initiators of modifications from absorbing costs that should be shared by others, we will allow the modifying party or parties to recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification."[58] The Commission further explained that the allocation method would need to take into consideration the depreciation to the modified pole or conduit and the increased maintenance costs resulting from the modification. Finally, the Commission indicated that it intended to address such cost allocation methods "in the context of a proceeding addressing the determination of appropriate rates for

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15499 ¶¶ 1191-1192 (1996).

[57] Id. ¶¶ 1211-1216.

[58] Id. ¶1214.

pole attachments . . . ."[59] Given that this is the proceeding intended to examine rates that will govern pole attachments by cable operators and telecommunications carriers through the year 2001, it appears that if the Commission is going to address the allocation methods used for modification costs, it should do so in this proceeding.

SBC urges the Commission to minimize the burden of its regulations in addressing this issue. For example, instead of requiring complex procedures, the Commission could simply modify the basic pole attachment formula to reflect the anticipated impact of modifications. The Commission should issue a further notice to propose simple guidelines for allocation of modification costs, as contemplated in the Local Competition Proceeding.

XIV. THE COMMISSION SHOULD CONTINUE TO ENCOURAGE PRIVATE NEGOTIATION OF POLE ATTACHMENT RATES.

The Commission should continue to encourage settlement of disputes concerning pole attachment rates through private negotiation.[60] If a disagreement arises between an attacher and a utility concerning the applicable pole attachment rate, the Commission should allow the parties to negotiate a settlement. The Commission should not allow either party to a settlement to later attempt to back out of the settlement by filing a complaint

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[59] Id. ¶1215.

[60] See 1987 Report and Order, ¶¶78-86.

concerning the agreed upon pole attachment rate. SBC suggests that the Commission establish reasonable restrictions on the filing of complaints in such circumstances.

Further, to minimize the burden of unnecessary complaints, SBC suggests that the Commission adopt certain presumptions that pole attachment rates are reasonable and comply with Section 224(d) when specified conditions are met. This approach would be analogous to the "safe harbor" or presumptions adopted in the Open Video Systems proceeding (CS Docket No. 96-46).[61] For example, the Commission should adopt a presumption that a rate is not excessive where the attacher has been paying the same or a higher rate without filing a complaint for a specified period, such as twelve months. Similarly, the Commission should consider a presumption that, unless a complaint involves a minimum threshold amount or a minimum number of attachments, it is not worthy of consideration. If a presumption approach is capable of assuring the reasonableness of Open Video Systems carriage rates, it should be at least as capable of regulating pole attachment rates while minimizing the burden on the parties and the Commission staff.

XV. CONCLUSION.

Section 224(e), as added by the Telecommunications Act of

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[61] Implementation of Section 302 of the Telecommunications Act of 1996; Open Video Systems, CS Docket No. 96-46, Second Report and Order, 11 FCC Rcd 18223 ¶¶114-124 (1996), recon. Third Report and Order and Second Order on Reconsideration, FCC 96-334, released August 8, 1996, ¶¶92-96.

1996, requires the Commission to adopt a modified formula for telecommunications carrier attachments by February 1998. However, before the Commission adopts the modified formula, it needs to adopt refinements to the existing formula in the areas discussed in the NPRM. These refinements resolve issues presented by aging plant, conduit usage and other changes that have occurred in the decade since the formula was last reviewed. As a result of these refinements, the formula should be well prepared to perform its task as needed in the foreseeable future.[62]

To avoid the distorting effect of future net salvage, the Commission should adopt a method that is based primarily on gross book costs, as described above. In the alternative, if the Commission does not adopt the gross book method, it should allow utilities to eliminate the net salvage from the depreciation reserve in all states. SBC concurs with the Commission's proposed conversion from Part 31 to Part 32 and the proposal to use an 11.25% rate of return.

The Commission should use a half-duct convention to determine the price of conduit usage. At least one full duct, reserved for maintenance or emergency purposes, should be deducted from the usable space. Where appropriate, a utility also should be allowed to deduct any municipal requirements.

The safety space should be assigned to the non-usable space.

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[62] Exhibit "C" includes suggested changes to two sections of the Commission's pole attachment rules to reflect some of the rule changes discussed in these Comments.